Supreme Court, U.S.
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No. 07-341

IN THE

Supreme Court of the United States

IN RE THE VISITATION OF:

M.S. and K.S., Grandchildren

By Next Best Friend,

BEVERLY R. NEWMAN

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a proceeding for grandparent visitation, was the trial court required to consider the grandchildren's Constitutional right of association with their grandmother and the grandmother's Constitutional right of association with her grandchildren?

2. Did the trial court's denial of grandparent visitations violate Beverly Newman's Constitutional rights to freedom of speech, freedom of religion, and freedom of thought?

LIST OF PARTIES

The following list identifies all of the parties to the proceeding below:

Beverly R. Newman, Petitioner Below

Julie Sondhelm, Respondent Below

M.S. and K.S., Real Parties in Interest

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Beverly R. Newman, respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals of Indiana affirming the decision of the Hamilton County Superior Court to deny her petition for grandparent visitation.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is set forth in Appendix A. The opinion of the Indiana Supreme Court denying transfer is set forth in Appendix B. The order of the Hamilton County Superior Court denying grandparent visitation is set forth in Appendix C.

JURISDICTION

This cause arises from the denial of a petition for grandparent visitation filed by Dr. Beverly R. Newman in the Hamilton County (Indiana) Superior Court pursuant to Ind. Code §§ 31-17-5-1, et seq., Indiana's Grandparent Visitation Act, seeking visitations with her two grandchildren. The Indiana Court of Appeals affirmed the trial court on January 24, 2007, and the Indiana Supreme Court denied transfer on June 13, 2007.

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Constitutional provisions, the pertinent portions of which are set forth below:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

U.S. Const. amend. XIV, Section 1.

STATEMENT OF THE CASE

Dr. Beverly R. Newman ("Beverly") filed her petition for grandparent visitation on June 29, 2004, pursuant to Ind. Code § 31-17-5 *et seq.*, seeking visitations with her grandchildren, M.S. and K.S., of elementary school age. The children's mother, Julie Sondhelm ("Sondhelm"), is Beverly's daughter and the custodial parent of the children. Jeffrey Sondhelm ("Jeff") is the children's stepfather.

M.S. was born in 1996, and K.S. was born in 1998. During Sondhelm's marriage to the children's father, she refused to have a relationship with her mother and only allowed Beverly to see M.S. a few times. Sondhelm's attitude quickly changed after she abruptly separated from and divorced the children's father in late 1999. Sondhelm eagerly sought, and Beverly lovingly provided, extensive, continuous care for the children from 1999 through 2002.

During that period, Beverly was virtually the exclusive babysitter for the children, who would typically spend 1-2 nights a week overnight at Beverly's home.

Beverly also provided: after-school care; care in the evening when Sondhelm attended college classes; weekend care; daytime care when the children were not in school due to holidays or illness; and care upon the children's frequent requests to be with their grandmother.

Beverly is a well-respected educator for 36 years of students from preschool through university levels. She holds a doctorate in reading education, K-12, and child psychology.

Since their mother worked full-time and was attending university classes for her Master's degree, Beverly was the primary caretaker for the children when they were sick,. At a moment's notice, Sondhelm often requested that Beverly provide care if M.S. or K.S. were sick, and Beverly always provided such care. Beverly's care might extend for a week or more on occasions when M.S. or K.S. remained ill. During said period of time, the children often asked their mother to go to their grandmother's house or stay overnight.

Beverly provided substantial financial assistance to Sondhelm for the children's classes, special activities, dress clothes, school clothes, school supplies, family vacations to Florida, boots, coats, shoes, food, entertainment, and recreation. Beverly also regularly paid for gifts for the children to give their mother on her birthday, holidays, and Mother's Day.

Beverly also provided the children with educational, religious, social, and familial activities, which were generally not provided by the children's parents, including: symphony orchestra concerts, theater performances, library and reading programs, religious services, religious holiday observances, and museum visits.

At age 5, just after M.S.'s sudden separation from Beverly, M.S. dictated an essay to her kindergarten teacher about her grandmother's important role in her life, saying:

> [My grandparents] take me to water parks and watch me play in the water .... they bake cookies for me, take me to the zoo, and take me on picnics .... My grandma always makes me feel better when I am sick. My grandparents love me very much!

As a result of the extensive amount of time they spent together – 6000 hours - and the care, attention, affection, and love provided by their grandmother, the children bonded very closely to their grandmother. In addition, Beverly provided an anchor of stability during a very unstable, traumatic period in the children's lives due to their parents' stormy dissolution of marriage and its turbulent aftermath.

In March 2002, Sondhelm invited her then-boyfriend, Jeff, to move in with her and the children. They were eventually married in March 2003. Once Jeff moved in with Sondhelm and the children, Sondhelm began to insist that Jeff provide care for the children that had previously been provided by their grandmother. Jeff, who was not yet 25 years old and unemployed at the time, became the primary babysitter for the children; and he became the primary caretaker for the children when they were ill, even though he had no previous child-care experience and was a virtual stranger to the children.

Beginning in August 2002, immediately following her engagement to Jeff, Sondhelm cut off all planned contacts between the children and their grandmother. Sondhelm no longer allowed Beverly to come to the Sondhelm house. Sondhelm would not allow the children to come to Beverly's house or to have any planned educational, religious, social, or

familial activities with their grandmother, despite frequent begging by the children to be with their grandmother. Sondhelm even cut off all telephone contact between the children and their grandmother.

Beginning in August 2002, the only contacts between the children and Beverly were occasional, random contacts when the children and their grandmother happened to meet in public, and at some of the children's school activities and programs that are open to the public. As a result of Sondhelm's actions, the children and Beverly usually have gone weeks and often months without any contact whatsoever.

Trial was held on Beverly's grandparent visitation petition in March and April, 2006. Sua sponte, the court ordered in camera interviews of the children, at which Sondhelm falsely told the judge in an ex parte conversation that K.S. did not want to be interviewed. Despite K.S.'s desire to speak to the judge, the judge repeatedly discouraged K.S. from being interviewed. K.S. insisted he wanted to speak to the judge, but the judge never asked him if he wanted visitations with his grandmother.

The trial court denied visitations by order dated May 9, 2006 (Appendix C). In its order, the court gave no consideration to Beverly's First Amendment rights to freedom of speech, religion, and of association with her grandchildren. The court also gave no consideration to the grandchildren's rights to freedom of association with their grandmother. The Indiana Court of Appeals affirmed the trial court order, and the Indiana Supreme Court denied transfer.

Beverly raised the issue of the children's Constitutional rights to grandparent association in the trial court on December 13, 2005, in her "Response to Motion to Dismiss Based on Unconstitutional Application of I.C. 31-17-5-1", stating:

> Beverly submits that in determining ... this case on its merits, particularly in its determination of the best interests of the children, this Court must necessarily consider the independent Constitutional rights and liberty interests of [M.S.] and [K.S] in preserving established familial bonds with their grandmother ....

Beverly again raised the issue of the children's Constitutional rights to grandparent association in her brief to the Court of Appeals. Beverly raised the Constitutional issues concerning her rights to freedom of speech, religion, thought, and association in her brief to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. IN A PROCEEDING FOR GRANDPARENT VISITATION, WAS THE TRIAL COURT REQUIRED TO CONSIDER THE GRANDCHILDREN'S CONSTITUTIONAL RIGHT OF ASSOCIATION WITH THEIR GRANDMOTHER AND THE GRANDMOTHER'S CONSTITUTIONAL RIGHT OF ASSOCIATION WITH HER GRANDCHILDREN?

This Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000) represented its first opportunity to visit the important issues inherent in the area of grandparent visitations. Given that *Troxel* was a case of first impression for this Court, its focus was naturally upon the Constitutional rights of the custodial parent. This Court accordingly did not

consider the concurrent Constitutional rights of the child and of the grandparent. The present case presents this Court with the opportunity to consider these issues of vital Constitutional import.

The Constitutionally-protected rights and liberties of children have been historically recognized by this Court in numerous cases. See *Parham v. J.R.*, 442 U.S. 584,600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52,74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution, and possess constitutional rights"); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-507 (1969) (First Amendment right to political speech); *In re Gault*, 387 U.S. 1,13 (1967) (due process rights in criminal proceedings).

While *Troxel* determined that a fit parent's decision regarding visitations should be accorded special weight when a court is considering a petition for grandparent visitation, the *Troxel* Court was careful not to define the extent, or the limits, of the parent's right to determine with whom her children could associate.

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context.
>
> Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child. (J. Souter, concurring).

In fact, the *Troxel* Court's determination was tempered by the fact that:

> we note that there is no allegation that [Mother] ever sought to cut off visitation entirely .... The Superior Court gave no weight to [Mother's] having assented to visitation even before the filing of any visitation petition or subsequent court intervention.

In other words, *Troxel* dealt with a case in which the custodial mother permitted grandparent visitations; the dispute between grandparent and parent thus centered solely upon the extent of visitation permitted by the parent. Since the *Troxel* grandchildren were experiencing regular, periodic visits with their grandparents both before and after the time the grandparent visitation petition was filed, the Constitutional rights of the grandchildren to associate with their grandparents was never implicated, because the grandchildren were able to associate with their grandparents. This Court therefore had no occasion to consider the associational rights of the grandchildren under the First and Fourteenth Amendments, and that issue remains ripe for determination in the present case.

This case presents an all-too familiar scenario in twenty-first century American family life. A recently-divorced mother, newly-faced with the burden of raising two young children on her own, turns to her oft-rejected mother for support and assistance. The assistance is significant, with the grandmother typically caring for the grandchildren several days each week, up to six days a week overnight, for a three-year period. As a result, the grandchildren bond closely to their grandmother, who becomes an integral and even-necessary part of their lives. With their grandmother, the children encounter many educational, cultural, and religious activities which they otherwise would have no opportunity to experience.

The mother then meets a much younger man, becomes engaged and marries him. No longer needing the support and assistance of the grandmother, the mother distances herself again from her own mother, cutting off the children from their grandmother in the process. When the grandchildren first were barred from having a relationship with their grandmother, Beverly was barely known to them. After three years of bonding, closeness, and love, the abrupt removal of their grandmother from their lives this time left an immense, irreplaceable void in the children's lives.

In the present case, the chasm between Sondhelm and Beverly centers around personal differences between them, primarily Sondhelm's inability to get along with her mother. Sondhelm had no issues with Beverly's treatment of her grandchildren, and in fact, recognized the value Beverly added to the children's lives. Sondhelm's decision to cut her children off from their grandmother after three years of closeness thus gave no consideration to the relationship the children had developed with their grandmother (with Sondhelm's own encouragement and blessing).

> While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State ... we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm. The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable

> of treating a child like a mere possession. *Troxel*, (J. Stevens, dissenting).

The *Troxel* rule as applied to the facts of that case correctly gave due credence to the mother's decision to permit a continued, but limited, relationship between her children and the grandparents they had grown to love and cherish. The *Troxel* formula was appropriate to the *Troxel* factual situation because the children were permitted by their mother to continue a regular, stable relationship with their grandparents. The children's Constitutional rights to association with their grandparents were not unduly affected by their mother's decision to limit, not eliminate, her children's relationship with their grandparents.

The application of the *Troxel* formula in the present case serves to trample on the associational rights of M.S. and K.S. with their grandmother. With the encouragement of their mother, M.S. and K.S. developed a closely-bonded loving relationship with Beverly. When Sondhelm decided to cut off her own relationship with her mother, for reasons having nothing to do with Beverly's treatment of the children, Sondhelm also unilaterally cut off her children's contact with their grandmother, with no regard to their own relationships. In such a situation, to give special weight to Sondhelm's decision without consideration of the children's relationship from their own point of view, is to deny the grandchildren's Constitutional due process rights, and in turn, their First Amendment rights of association with their grandmother.

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interest. There is, at a minimum, a third individual whose interests are implicated in every case to

which the statute applies – the child. *Troxel*, (J. Stevens, dissenting).

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds [*Michael H. v. Gerald D.*, 491 U.S. 110,130 (1989)] (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interest in preserving such intimate relationships, so too do children have these interests, and so too must their interest be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that, when it comes to parental rights, children are so much chattel ... The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child .... The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. *Troxel*, (J. Stevens, dissenting).

Lower courts across the country, including Indiana, have traditionally recognized that children have an associational right with their grandparents. The fundamental right of association between grandparents and grandchildren is set forth in *Sightes v. Barker*, 684 N.E.2d 224,232-233 (Ind. Ct. App. 1997), citing *Michael v. Hertzler*, 900 P.2d 1144,1149 (Wy. 1995):

> The Supreme Court of the United States clearly has recognized that children are "persons" within the meaning of the Bill of Rights .... In our cases, the right to associate with one's family is identified as a fundamental liberty ... We perceive this interest to be an equivalent fundamental right to that asserted by [the parent]. It is available to children and grandparents, as well as parents, and the state has an equal duty to protect the fundamental rights of the grandparents and the children ... We conclude that, in addition to the compelling state interest attaching to the best interest of the children, the compelling state interest exists in maintaining the right of association of grandparents and grandchildren.

A child possesses his own Constitutional rights. This has been established by numerous state supreme courts from coast to coast across the United States, and including this Court, which has ruled: "[C]hildren themselves have constitutionally protectible interests." *Wisconsin v. Yoder*, 406 U.S. 205,243, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (Douglas, J., dissenting in part).

The Connecticut Supreme Court in *Lehrer v. Davis*, 571 A.2d 691,695 (Conn. 1990), upheld the constitutional rights of the child's relationship with grandparents to preserve family integrity:

> The legislative determination to allow grandparents ... the opportunity to demonstrate that they may significantly contribute to the best interest of the child, finds constitutional support, furthermore, in the recognition that "[t]he constitutional concerns are not entirely parental because the preservation of family integrity 'encompasses the reciprocal rights of both parent[s] and children (Citations omitted).'"
>
> The importance to children of stability and continuity in their close relationships is well recognized. Psychiatrists and psychologists ... unanimously counsel that children should maintain and retain meaningful relationships and that to deny them continuing contacts is a deprivation .... Stability, continuity, and opportunity, of and for meaningful associations are said to build a healthy psyche (Citations omitted) (Emphasis added).

The Wyoming Supreme Court in *Nation v. Nation*, 715 P.2d 198,206 (Wyo. 1986), furthermore advanced the elevated status of the child above the wishes of the parents:

> Of paramount consideration is the present and future welfare of the children. Their welfare must be provided for with as little uncertainty as possible. All other considerations, including the wishes, rights and happiness of parents are subordinate thereto (Citations omitted) .... Lacking constitutional overlay, grandparent visitation decisions can actually personify the judicial search for the best interest and welfare of the child. Gratification of wishes, and rights and happiness of relatives are subordinate (Citations omitted).

Similarly, the Indiana Court of Appeals and the Indiana Supreme Court have upheld the child's welfare as utmost: "The rights of parents are not absolute. They must yield to the welfare of the child." *Bailey v. Menzie*, 542 N.E.2d 1015,1019 (Ind. Ct. App. 1999), citing *Gilchrist v. Gilchrist*, 75 N.E.2d 417,419, 225 Ind. 367,372 (Ind. 1947).

The Supreme Court of Kentucky in *King v. King*, 828 S.W.2d 630,632 (Ky. 1992), affirmed the undeniable bond of grandchildren with their grandparents and those contacts which develop the characters of children:

> If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love.

A child's right to love and associate with his grandparent, if the grandparent is physically, mentally, and morally fit, transcends the wishes of his parent.

Since "[T]he right to associate with one's family is a fundamental liberty," *DS v. Dept. of Public Assistance & Social Services*, 607 P.2d 911,918 (Wyo. 1980), and the child is a person under the Constitution of the United States, both Beverly and her grandchildren have Constitutional rights to associate with each other. There exists:

> a large body of state and federal constitutional law defining the interests individuals have in their family associations. The right to associate with one's immediate

> family is a fundamental liberty protected by the state and federal constitutions.
> *Id.*, at 918.

Both the trial court and the Indiana Court of Appeals improperly focused solely on the animosity which Sondhelm held for her mother, and the resultant family discord between mother and grandmother. However, this familial discord was active for years before the three-year period from 1999 through 2002 when M.S. and K.S. established their natural relationship with their grandmother. Sondhelm nonetheless encouraged her children for three years to build a strong and lasting relationship with Beverly, during a period in time when Sondhelm needed her mother. The children responded as all normal children would, notwithstanding their mother's actual motivation.

Despite the fact that Sondhelm herself promoted the relationship between her children and her mother, the Indiana courts upheld her purported right and ability to unilaterally end the grandchild/grandparent relationship on behalf of her children. While the Indiana courts followed this Court's directive in *Troxel* and gave special weight to Sondhelm's decision to terminate all visitations between the children and Beverly, the courts gave no credence to the immeasurable benefits of the grandchild/grandparent relationship to the grandchildren As the law now stands under *Troxel*, the nation's courts may not balance the associational rights of the child against the due process rights of the parent who makes the decisions for the child. As a result, governmental action by the court's results in Beverly's grandchildren growing up with severed bonds, totally out of their control, unable to trust an adult world which has forcibly separated them from their grandmother.

There is no question that the right of children to associate with their grandparents is a fundamental right subject to Constitutional protections. The benefit to children of a lasting relationship with their grandparents is irrefutable. The New Jersey Supreme Court, in *Mimkon v. Ford*, 332 A.2d 199,204-205, lauded the human truth of the grandchild-grandparent relationship as uniquely beneficial to children:

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

The *Troxel* court recognized the need for children to benefit from relationships with their grandparents, and the Constitutional import of those relationships:

> Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the

> relationships those children form with such third parties .... children should have the opportunity to benefit from relationships with statutorily specified persons –for example, their grandparents .... these statutes can present questions of constitutional import. *Troxel v. Granville*, 530 U.S. 57 (2000).

Notwithstanding the fact that grandparents often assume the role of child-rearing, they can nonetheless be capriciously eliminated by the parent from their grandchildren's lives in a moment. While the parent's decision, no matter how ill-founded, receives special weight from the courts, the role of the grandparent in the children's lives, no matter how beneficial, receives no such preference.

On one hand, the courts do clearly recognize grandparents fulfilling parental roles, but on the other hand, those same grandparents have no corresponding "parental rights," meaning no legal rights parallel to the rights of biological parents, regardless of the duration and significance of the grandparents' role in raising their grandchildren. Even less recognized in the law are the rights of children involuntarily locked into transitory relationships with the grandparents serving as child rearers, but suddenly dismissed from the children's lives by parents whose rights are superior under the law.

Accordingly, with greatly increasing numbers of families being held together by grandparents caring for their grandchildren during a time of war-torn and divorced families, the time is ripe for this Court to declare that children have a due process right to freedom of association with their grandparents. The Supreme Court has never had occasion to decide whether a child has a liberty interest in maintaining a filial relationship. *Michael H. v. Gerald D.*, 491 U.S. 110,130 (1989). Yet, this Court has consistently

recognized associational rights involving private family life as worthy of special constitutional protection. *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1976).

> We have said that the Constitution protects certain kinds of highly personal relationships. There is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents. *Overton v. Bazzetta*, 539 U.S. 126 (2003).

The extent of the child's right of association in a particular case is properly framed by the pre-existing relationship developed between the grandparent and grandchild. In a case in which the grandparent has not developed a strong bond with the grandchild, the child's associational right would be accordingly weaker. In a case such as this one, in which the children over a period of years developed a positive, enduring, and deep bond with their grandmother, and the grandmother functioned for three years in rearing the children, the associational right of the child to continue the relationship with the grandparent would be proportionately stronger. The child's associational right would accordingly be balanced against the right of his/her parent to direct the upbringing of the child. Such a balancing test recognizes that in a case such as this one, the child's needs for a continuing relationship with the grandparent must be considered by a court in determining whether it is appropriate to grant grandparent visitation.

At the same time, this Court should also explicitly recognize a liberty interest of grandparents in their associations with their grandchildren. Such a liberty interest

has already been recognized by lower courts in cases in which the grandparent has participated in the upbringing of the grandchild, such as Beverly did for three years with her grandchildren.

> Nothing in our tradition or precedent can credibly be read to suggest that the right to participate in child rearing does not extend to grandparents. *Johnson v. City of Cincinnati*, 310 F.3d 484,500 (6th Cir. 2002). The Supreme Court has not addressed the specific issue of whether a grandmother has a fundamental freedom of association right to participate in the upbringing of her grandchildren. *Id.*, 310 F.3d at 500.

In *Johnson*, the grandmother neither lived with nor acted as the guardian of her grandchildren. She helped care for her grandchildren and regularly took two of the children to school. Accordingly, the Sixth Circuit held that she had been an active participant in the lives and activities of her grandchildren, and found that the grandmother did have a fundamental freedom of association right to participate in the upbringing of her grandchildren.

Precedents from this Court compel a finding that a grandparent's right to associate with her grandchildren is a fundamental right under the Constitution:

> In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" ... but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protection so

> rooted in the traditions and conscience of our people as to be ranked as fundamental. .... Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society .... The protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude a societal tradition of enacting laws denying the interest. The purpose of limiting the Due Process Clause to traditionally protected interests is to prevent future generations from lightly casting aside important traditional values .... *Michael H. v. Gerald D.*, 491 U.S. 110,122 (1989).

The right to associate, in general, has been determined to be a fundamental right under the Constitution:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights .... In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right .... Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance .... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

With respect to a grandparent's Constitutional right to associate with other members of her family, this Court long ago determined that in a Constitutional sense, the "family" is made up of far more people that just the "nuclear family," and grandparents in particular are recognized as part of the Constitutionally-recognized "family":

> Government may not constitutionally define "family" as essentially confined to parents and the parents' own children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (J. Brennan, concurring).

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition .... Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.... Decisions concerning childrearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household -- indeed who may take on major responsibility for the rearing of the children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

A liberty interest may arise from the Constitution itself, by reason of the guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies. *Wilkinson v. Austin,* 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). Hence, Indiana's common law tradition of permitting grandparent visitations further compels a finding that a grandparent's association with her grandchildren is a fundamental right. Prior to the passage of Indiana's Grandparent Visitation Act in the early 1980s, Indiana did recognize a common law right for grandparents to seek visitation with their grandchildren under certain circumstances. *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. Ct. App. 1981).

Lower courts have long recognized family-based associational rights that go beyond that of parent and minor children. For example, The Ninth Circuit has consistently recognized a Fourteenth Amendment liberty interest of parents in the companionship and society of their adult children. *Wilson v. Maricopa County*, 463 F.Supp.2d 987,999 (D. Ariz. 2006). The Tenth Circuit held in *Trujillo v. Bd. of County Comm.,* 768 F.2d 1186, 1189 (10th Cir.1985) that a mother and sister had a constitutional liberty interest in the companionship and society of their respective son and brother, thus recognizing constitutional claims by parents and siblings.

This Court has specifically anticipated the likelihood of its ruling that a grandparent who has participated in the rearing of her grandchildren has a fundamental right of association which would need to be balanced against the parent's right to direct the upbringing of her children:

> Cases are sure to arise ... in which a third party, by acting in a caregiver role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. *Troxel v. Granville*, 530 U.S. 57 (2000) (J. Kennedy, dissenting).

> Judicial vindication of "parental rights" under a Constitution that does not even mention them requires .... judicially defined gradations of other persons (grandparents ...) who may have some claim against the wishes of the parents. *Troxel, supra* (J. Scalia, dissenting).

In the present case, Beverly spent approximately 6000 hours caring for and helping to raise her grandchildren M.S. and K.S. from 1999 through 2002. Beverly was virtually the exclusive babysitter for the children, and was the primary caretaker for the children when they were sick. She further provided substantial financial assistance for the children's classes, special activities, clothes, school supplies, vacations, entertainment, and recreation.

Beverly also provided the children with educational, religious, social, and familial activities. Finally, Beverly provided an anchor of stability for the children during the traumatic time of their parent's sudden dissolution, divorce, and aftermath.

All of the compelling reasons for finding a grandparent's associational right with her grandchildren are present in this case. Accordingly, this Court should hold that a grandparent who has significantly participated in the rearing of her grandchildren has a Constitutionally-protected interest in her association with her grandchildren which must

be given special weight by the court in its determinations concerning the grant of grandparent visitation.

2. DID THE TRIAL COURT'S DENIAL OF GRANDPARENT VISITATIONS VIOLATE BEVERLY NEWMAN'S CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH, FREEDOM OF RELIGION, AND FREEDOM OF THOUGHT?

The trial court violated Beverly's Constitutional rights to freedom of religion, freedom of speech, and freedom of thought in its determination that Beverly was not entitled to grandparent visitations.

The First Amendment to the United States Constitution, which extends to the states via the Fourteenth Amendment, states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...."

The trial court's May 9, 2006, Findings of Fact, Conclusions of Law and Order (Appendix C) is replete with disparaging personal attacks against Beverly related to her exercise of the Jewish religion, as follows:

1. using her grandson's "biblical" Jewish middle name rather than his given first name;
2. "dogging" her family at their place of worship (where Beverly has attended services for over 50 years);
3. writing private letters to Rabbis, whom Beverly has known for years, concerning family matters;
4. going places in the Jewish community where the judge says Beverly is not welcome; and

5. praying at St. Vincent Hospital during the birth of Beverly's fourth grandchild, which the judge painted as a ruse to see M.S. and K.S.

The commonalities of these five criteria for deeming Beverly to be unfit as a grandmother are two-fold: each is an aspect of the observance of Judaism; each is also an expression of the most basic First Amendment rights in America – freedom of religion, freedom of speech, and freedom of thought.

In Finding No. 24, the judge censured Beverly for calling her grandson by his given (middle) "biblical" name, "Daniel," rather than by his first name, "Kian." The judge denounced Beverly's use of the name "Daniel" as a "glaring example" and "inexcusable," accusing Beverly of attempting to "dominate and control" because she calls her grandson by his middle name.

The forceful language used by the court in denouncing Beverly establishes the importance given by the court to the issue of the grandson's name in its decision to deny visitations. By hinging the grant or denial of visitations on the name Beverly uses to call her grandson, as well as severely criticizing Beverly for using what the court viewed as a "Biblical" name, the court abused its power in violation of Beverly's rights of free speech and religious freedom.

Significantly, it was Sondhelm herself who gave her son the first name "Daniel" in his Hebrew name, and the middle name "Daniel" in his English name. Since a child's Hebrew name frequently has no connection to the Bible, the "Biblical" light cast upon the name was the invention of the trial judge. Clearly, "Daniel" is not some pet name made up by his grandmother but despised by his mother; it is his name chosen for him by his mother.

In the context of a trademark case, the court ruled that an individual's decision to use a name other than the birth name – whether the decision rests on religious, marital, or other personal considerations – does not therefore imply intent to set aside the birth name, or the identity associated with that name. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407,412 (9th Cir. 1996).

Similarly, Beverly's choice to refer to her grandson by his given middle name does not imply any attempt by her to deny or disparage his given first name, or to set aside whatever identity his mother may attach to his first name. Rather, Beverly's use of her grandson's given middle name is simply an expression of her freedom of speech and thought. So too were her letters to the Rabbis and her prayers in the hospital lobby while her fourth grandchild was being born. By denying grandparent visitations because Beverly called her grandson by his given middle name, wrote private letters to Rabbis about personal family matters, and prayed in the public area of a hospital, the trial court effectively took state action against Beverly in violation of her First Amendment rights of freedom of speech and thought. In the instant case, Beverly was not speaking at all in the hospital lobby, but praying silently, unobtrusively to herself. Beverly's right to do so should not be affected by state coercion.

The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705,714 (1977).

The Constitutional basis for the protection of freedom of thought has never been fully clarified. It undeniably finds its root in the First Amendment, and is undeniably protected, because at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and

his conscience rather than coerced by the State. *Vaughn v. Lawrenceburg Power System*, 269 F.3d 703,717 (6th Cir. 2001).

A concern for freedom of thought was present at the time of the adoption of the First Amendment, and this provision is closely associated historically with that concern. One distinguished commentator has interpreted much of the history of First Amendment jurisprudence as the preservation of freedom of though in various contexts.

> By speaking of freedom of thought I wish to push to the fore exactly that which developed first Amendment doctrine ... seeks to establish; that the state has no business seeking to control – that is, to prohibit or command – the minds of its citizens.

Charles Fried, Perfect Freedom, Perfect Justice, 78 B.U.L. Rev. 717,723-24 (1998), cited in *Vaughn v. Lawrenceburg Power System*, 269 F.3d 703,718 (6th Cir. 2001).

> Freedom of thought is the highest order freedom, and limitations on that freedom are the most radical incursions as they limit the process by which we determine whether to accept any and all other limitations.

Charles Fried, Perfect Freedom, Perfect Justice, 78 B.U. L.Rev. 717,735 (1998), cited in *Vaughn v. Lawrenceburg Power System*, 269 F.3d 703,718 (6th Cir. 2001).

The trial court sought to use the power of government compulsion to control Beverly's thoughts. If she wanted visitations with her grandchildren, she was not allowed to think of her grandson in any manner other than by his first

name, and she certainly was not allowed to express her thoughts concerning his name in any manner. Likewise, she was not allowed to think of her Rabbis as confidantes for her thoughts, and she was not even allowed in the hospital to silently express her spiritual thoughts through prayer. An effective way for government to control its citizens' thoughts is to prohibit the expression of thoughts disapproved of by the government.

Beverly's right to freedom of speech was totally denied by the trial court, which placed arbitrary restrictions on what can be said and where between a grandparent and her grandchild, despite the fact that the content of speech does not violate any of the typical taboos of free speech, namely, obscenity, incitement to violence, or inducing public panic. Calling a boy "Danny" is not obscene, inflammatory to violence, or inducing of public panic.

The judge's denunciation of a grandmother for "dogging" her own family at "their place of worship" further exemplifies the extent to which the state is interfering with the free exercise of religion, for it seeks to limit Beverly's reasonable access to the synagogue that she attended since she was a little child, when she should certainly have the Constitutional right to move freely within her own house of worship. The trial court's use of inflammatory terms, such as "shadowed" and "dogged," for perfectly-normal behaviors demonstrates its intolerance for Newman's Constitutional rights. Beverly did not follow Sondhelm all over town; Beverly simply went to her own synagogue where she attended services with her grandparents since she was a little girl.

Additionally, the trial court severely criticized Beverly for sending a letter to Rabbis concerning family matters (Finding No. 21), abridging her rights to freedom of religion, speech, and thought. The court implied that Beverly

had made false allegations in her confidential communications with Rabbis, yet found Beverly's allegations to be true concerning crimes committed against her granddaughter.

Similarly, the trial court abridged Beverly's rights to freedom of religion and thought when it denied visitations because the court was offended by Beverly's praying at St. Vincent Hospital and going places in the Indianapolis Jewish community (Findings Nos. 29 and 18).

On the rare occasions that Beverly saw her grandchildren, the trial court severely chastised her for walking with the children to their car. When a grandmother goes months without any contact with her grandchildren, what court would legitimately begrudge her a few moments to speak with her grandchildren and deny grandparent visitation on that basis? Yet Beverly's perfectly-normal actions were distorted into something objectionable by the court, displaying its animus to Beverly's Constitutional right to freedom of speech, as well as her freedom of familial association.

Will the precedential value of the trial court's decision be allowed to serve as the model for future prejudicial judicial decisions against grandparents and parents whose use of "Biblical" names is offensive to a particular judge or whose private letters to the clergy offend judicial sensibilities? Will the minimalistic threshold established in this case set the bar for denying grandparent, grandchildren, and parental rights across the country? If the right to be a parent is the most basic right of humanity, then the right to be a participating grandparent in the lives of grandchildren is equally fundamental to a moral society. Using the power of the state to deny this fundamental human right, except in cases of truly-dangerous conduct by grandparents, is a direct attack on the fabric of society, the

multigenerational family. Simply calling a child "Daniel" does not constitute dangerous conduct, nor does praying silently in a hospital lobby. In a moral society, families cannot be severed by the state for the sake of a "Biblical" name, a silent prayer, or confidential letters to clergy.

If this decision is allowed to stand, grandparents and grandchildren across this nation will be compromised severely in their ability to have normal, natural relationships with each other, by the arbitrary establishment of religion through the courts and by arbitrary restrictions on freedom of speech and thought, that can be used as case law well beyond even the scope of grandparent/grandchild relationships. When a judge can dictate and micromanage the spoken and unspoken thoughts of a competent senior, and severely punish both the elder and her grandchildren by severing the family line through court-imposed sanctions, the United States Constitution is decimated at its very core; for the most fundamental freedoms upon which this nation was founded are indisputably the freedom to worship without state-established restrictions, and the freedom to think and speak without state reprisal.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 10, 2007

APPENDIX A

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA
No. 29A05-0606-CV-322

IN RE THE VISITATION OF:

M.S. and K.S.
Grandchildren,

By Next Best Friend
BEVERLY R. NEWMAN,
Appellant-Petitioner.

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steve David, Special Judge
Cause No. 29D03-0501-DR-002

January 24, 2007
MEMORANDUM DECISION - NOT FOR PUBLICATION
BAKER, Judge

As the trial court noted in its order denying Newman's petition for court-ordered grandparent visitation time, this case "is a soap opera." Appellant's App. p. 27. And it's a bad soap opera at that. Appellant-petitioner Beverly R. Newman has a daughter, Julie Sondhelm, who has two children—ten-year-old M.S. and eight-year-old K.S.—that are the subject of this action. Newman filed a petition with the trial court requesting court-ordered grandparent visitation time with M.S. and K.S., which the trial court denied. On appeal, Newman raises six issues, which we restate as: (1) whether the trial court violated Newman's freedom of speech, free exercise of religion, and freedom of association; (2) whether the trial court improperly took judicial notice of three matters; (3) whether the trial court's findings of fact were supported by evidence and its decision was in the best interests of M.S. and K.S.; (4) whether the trial court erred when it quashed four testimony subpoenas and admitted two exhibits over Newman's objections; (5) whether an ex parte communication between Sondhelm and the trial court prior to in camera interviews with M.S. and K.S. prejudiced Newman; and (6) whether the trial court was biased against Newman.

On cross-appeal, Sondhelm argues that the trial court erred by not awarding her attorney's fees. Sondhelm also requests that we award her appellate attorney's fees pursuant to Indiana Appellate Rule 66(E).

For the reasons elaborated upon below, we affirm the trial court's order denying Newman court-ordered grandparent visitation time with M.S. and K.S. Regarding attorney's fees, we find that the trial court did not err when it denied Sondhelm's request because Indiana Code section 31-

17-7-1 does not apply and the trial court did not find that Newman acted in a vexatious nature. We also decline Sondhelm's request for appellate attorney's fees.

FACTS

For more than two decades, Newman and Sondhelm have had an extremely tumultuous mother-daughter relationship that has only occasionally been cordial. Newman married Lawrence Newman 1 in 1987, seventeen years after Sondhelm was born. In May 1993, Sondhelm married Shahram Shirazi, a man of Iranian-Persian descent. Newman did not attend the wedding ceremony, and Sondhelm and Newman's relationship was very limited throughout Sondhelm and Shirazi's marriage. Sondhelm gave birth to M.S. on October 17, 1996, and K.S. on September 25, 1998. Newman was not present during M.S.'s birth but was in the hospital parking lot during K.S.'s birth. Despite Sondhelm's repeated requests for Newman to call K.S. by his first name, Newman has referred to K.S. as "Danny" since his birth because, as she testified, it is "his middle name, his Hebrew name . . . ." Tr. p. 202.

In August 1999, Sondhelm and Shirazi separated. Newman called Sondhelm and the two met to discuss Newman's desire to spend time with Sondhelm, M.S., and K.S. Sondhelm cautiously agreed to resume a relationship with Newman and to bring the children to visit Newman once a month. Eventually, visitation became more frequent and Newman began to visit her grandchildren three or four times a week. On occasion, Sondhelm would attempt to limit Newman's contact by telling her that she needed to have her own "family time" with M.S. and K.S but Newman would "show up anyway." Id. at 63. In December 2000, Sondhelm met Jeff Sondhelm (Jeff) and the two began dating.

As time went on, Sondhelm became concerned with Newman's anxieties and actions and their impact on her children. After September 11, 2001, Newman believed that the end of the world was coming, began to gather supplies, and insisted on keeping copies of the children's birth certificates and passports as a precaution. Newman also began expressing her concerns over health-related issues and told the children that there were poisons in non-organic food and that they should not walk on grass because of pesticides.

In March 2002, Jeff moved into Sondhelm's home, and the two became engaged in August 2002. After the engagement, Sondhelm became more concerned about Newman's behavior because she would be disrespectful to Jeff in front of M.S. and K.S. Newman became angry when Sondhelm suggested that things "cool down for a little bit." Id. at 343. At that point, Newman started "calling non-stop to [Sondhelm's] house and work . . . ." Id. at 344. Newman left notes in Sondhelm's vehicle, one of which read, "May God wreck [sic] a vengeance upon you," and notes in the children's car seats that read "[I]f you need help, call Grandma[,]" with Newman's phone number in large numbers. Id. at 352.

Sondhelm and Jeff married on March 15, 2003. Newman did not participate in the planning of the wedding, did not attend the rehearsal dinner, and did not RSVP. However, Newman showed up the day of the ceremony and was "very disruptive." Id. at 354. Sondhelm and Jeff have had two children since their marriage.

Things between Newman, Sondhelm, and Jeff soon reached a breaking point. In the spring of 2004, Newman waited outside of Sondhelm's work. When Sondhelm and K.S. arrived, Newman waved a piece of paper at Sondhelm and said, "I have evidence against you, and I'm going to use it against you." Id. at 355. Sondhelm kept walking because

she "didn't feel it was appropriate for [five-year-old K.S.] to hear" these things, and she told Newman that she would pursue a protective order if Newman continued to harass her. Id. at 355-56.

Later that year, Sondhelm contacted the Jewish Community Center (JCC) and asked that her mother be banned from events involving M.S. and K.S. because Newman was not a member of the JCC and was a disruption to Sondhelm's family. During a May 2005 art show in which K.S. was participating, Newman stood outside the JCC for five hours with a large sign that read "JCC bans Grandma from Daled art show." Respondent Ex. D; Tr. p. 356.

Newman has also made unflattering allegations against Julie and Jeff. In May 2004, Newman sent a fax titled "Employee Grievance" to Sondhelm's work in which Newman relayed "inappropriate conduct" by Sondhelm and Jeff following a soccer practice where she accused Jeff of "physical assault" and asked Sondhelm's employer to "advise [Sondhelm] that she is not to argue with [Newman] in front of any child, not to defame or harass [Newman], and not to condone any physical assault enacted by her husband." Respondent Ex. E. Newman later filed for a protective order against Jeff, and the Marion County Superior Court issued a protective order from October 11, 2005, until December 11, 2005.

On June 29, 2004, Newman filed a petition seeking court-ordered grandparent visitation, pursuant to Indiana Code section 31-14-5-1(a)(2) because M.S. and K.S.'s parents, Sondhelm and Shirazi, dissolved their marriage in Indiana. Court-ordered mediation took place on October 19, 2004, but was unsuccessful. Between June 29, 2004, and January 26, 2005, two judges recused themselves, and a special judge from Boone County assumed jurisdiction on March 21, 2005.

On February 9, 2006, Shirazi filed a verified motion to quash his testimony subpoena from Newman, which the trial court granted on February 15, 2006. On February 16, 2006, Naomi Tropp and Bev Brown filed motions to quash their testimony subpoenas from Newman, which were both granted on March 1, 2006. On February 28, 2006, Saundra Classick filed a motion to quash her testimony subpoena from Newman, which was granted on March 2, 2006.

The trial court held a hearing on March 3, 2006, and April 3, 2006. The judge interviewed M.S. and K.S in his chambers on April 26, 2006. Newman objected to the interviews. The trial court issued findings of fact and conclusions of law on May 9, 2006, and denied Newman's petition for grandparent visitation. On May 26, 2006, Newman filed a motion to correct error and a verified motion to disqualify the special judge. The trial court denied both motions on June 6, 2006. Newman now appeals.

DISCUSSION AND DECISION [2]

I. Grandparent Visitation

By enacting the Grandparent Visitation Act [3] (the Act), our legislature has recognized that "a child's best interest is often served by developing and maintaining contact with his or her grandparents." Swartz v. Swartz, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). However, grandparents "do not have the legal rights or obligations of parents," and "do not possess a constitutional liberty interest in visitation with their grandchildren." Id. at 1221-22. In contrast, parents do have a "constitutionally recognized fundamental right to control the upbringing, education, and religious training of their children." Id. Furthermore, in "our traditions and collective conscience," we have acknowledged that parents "have the right to raise their children as they see

fit." Id. Therefore, when it drafted the Act, our legislature had to balance two competing interests: "the rights of parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren." Id.

The Act provides that the trial court may grant visitation rights if it determines that "visitation rights are in the best interest of the child." Ind. Code § 31-17-5-2. The determination of the best interests of the child is committed to the sound discretion of the trial court and will be reversed on appeal only upon a showing of an abuse of that discretion. Swartz, 720 N.E.2d at 1221. An abuse of discretion exists where the trial court's decision is clearly against the logic and effects of the facts and circumstances before the trial court or the reasonable, probable deductions to be drawn therefrom. Id. We will not reweigh the evidence nor judge the credibility of the witnesses. Id.

In Crafton v. Gibson, 752 N.E.2d 78, 98 (Ind. Ct. App. 2001), we ruled on the constitutionality of the Act in light of the United States Supreme Court's plurality opinion in Troxel v. Granville, 530 U.S. 57 (2000). In upholding the Act's constitutionality, we discussed factors courts must take into consideration when determining a child's best interests. First, courts are to "presume that a fit parent's decision is in the best interests of the child." Crafton, 752 N.E.2d at 96 (citing Troxel, 530 U.S. at 69). Acting under this presumption, courts must give special weight to a parent's decision to deny or limit visitation. Troxel, 530 U.S. at 69-70. Second, a court should give some weight to the fact that a parent has agreed to some visitation, if that in fact is the case. Megyese v. Woods, 808 N.E.2d 1208, 1213 (Ind. Ct. App. 2004). Still, while we must presume under Troxel that a fit parent's decision regarding visitation is in the child's best interests, that presumption is rebuttable. Crafton, 752 N.E.2d at 96. "Thus, a grandparent seeking visitation has the burden

of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest." Id. at 96-97.

II. Freedom of Speech, Free Exercise of Religion, and Freedom of Association

Newman argues that the trial court violated her constitutional rights to freedom of speech, free exercise of religion, and freedom of association as exhibited by the trial court's "personal attacks . . . related to her exercise of the Jewish religion." Appellant's Br. p. 10. Specifically, Newman directs us to the trial court's findings that (1) Newman refers to K.S. as "Daniel" his "'biblical' middle name'" rather than his Iranian-Muslim first name and (2) that Newman has "dogged [the Sondhelms] at their place of worship." Appellant's App. p. 30. The gravamen of Newman's argument is that the trial court hinged its decision on her religious practices and, therefore, violated her constitutionally-protected rights.

We do not deny that the First Amendment to the United States Constitution, which has been extended to the states via the Fourteenth Amendment, provides for the freedom of speech, the free exercise of religion, and the freedom of association. However, the trial court's findings regarding Newman's actions were not an attempt to infringe upon these constitutional rights. The trial court found:

24. A glaring example of Beverly Newman's refusal to acknowledge her daughter's authority over the children in question is the fact that Beverly Newman will not call the male child [his given first name]. Beverly Newman insists on calling him "Daniel", his "biblical" middle name. She has insisted on doing this despite repeated requests to call him [his given first name]. [Newman] and her counsel even improperly referred to the child during the trial in this

[manner]. Such is inexcusable, and is further evidence of her attempts to dominate and control.
***
29. Ms. Newman has followed [Sondhelm] and her children to their car on many occasions. She has shadowed or dogged them at their place of worship, on the soccer filed, and has "camped" out at the hospital hoping to see the children. Appellant's App. p. 30 (emphases added).

By citing Newman's choice to call K.S. "Daniel," the trial court was using Newman's decision as evidence of her refusal to acknowledge Sondhelm's parental authority over K.S. and M.S. The trial court's finding was not an attack on Newman's religion or her religious choices. In fact, it was Newman who cast a religious light on the name. She testified at the hearing that "Danny" is K.S.'s "Hebrew name . . . ." Tr. p. 202. The trial court's reference to "Daniel" as K.S.'s "biblical name" is a direct extension of Newman's own religious classification of the term. Appellant's App. p. 30. Therefore, the trial court did not infringe on Newman's freedom of speech or religious rights when it made its finding; it merely cited Newman's choice to call K.S. "Daniel" as "[a]glaring example of Beverly Newman's refusal to acknowledge her daughter's authority over the children . . . ." Id.

Newman also argues 4 that the trial court interfered with her free exercise of religion by finding that she "dogged" Sondhelm, M.S., and K.S. at the synagogue that Newman has attended for most of her life. However, the trial court's finding merely alludes to evidence presented at the hearing regarding Newman's actions after the services, specifically her choice to leave unsolicited notes for her grandchildren in Sondhelm's vehicle and to physically hold onto the children after the services to "prolong her contact with them." Tr. p. 352-53. In the same vein as the trial court's citation of Newman's choice to call K.S.

"Daniel," the trial court used Newman's post-service actions as support for its finding that she "refuses to accept limits requested by [Sondhelm]" and that "it does not serve the best interests of the children for there to be court-ordered grandparent visitation." Appellant's App. p. 27, 31. The trial court's findings relate to what Newman did while at the synagogue; The findings place no impairment or restrictions on her ability to practice or exercise her religion.

In sum, the trial court was not trying to "dictate or micromanage," appellant's br. p. 11, Newman's actions and it did not infringe upon her constitutionally-protected rights. Instead, the trial court cited Newman's choices as evidence supporting its ultimate conclusion that court-ordered grandparent visitation was not in the best interests of M.S. and K.S. because Newman refuses to accept limits that Sondhelm sets regarding her children. Therefore, we find that Newman's constitutional challenges must fail.

III. Judicial Notice

Newman argues that the trial court improperly took judicial notice of three matters. Specifically, Newman challenges the trial court's decision to take judicial notice of two unrelated lawsuits that Newman has filed and Shirazi's opinion regarding grandparent visitation.

Regarding Shirazi's opinion concerning Newman's visitations with M.S. and K.S., Sondhelm's counsel asked the trial court to "take judicial knowledge of [Shirazi's verified motion to quash his subpoena and motion for protective order and order for attorney's fees], specifically references made by his counsel as to his position with regard to visitation." Tr. p. 444. The trial court responded, "Well, I'll take judicial notice of the pleadings. I'm not going to—I'm not interpreting those as evidence. . . . Any reference as to [Shirazi's]position on the merits of the case, I will not admit

this document for that purpose. He's not here. He's chosen not to testify." Id. at 444, 446. Newman directs us to Finding 6:

6. Shirazi, the biological father of the two children, did not appear to testify. However, he was deposed on two separate occasions and his depositions were introduced into evidence. Although [he] appears at times to be ambivalent about visitation, he agreed [to it] only if it were supervised visitation. His counsel has stated in a filing with this Court that he opposes any visitation sought by [Newman]. Appellant's App. p. 26 (emphasis added).

Newman argues that Finding 6 contradicts the trial court's ruling that it would not interpret Shirazi's pleading as evidence because he chose not to testify at trial. However, as the trial court explicitly states in its findings, it was referencing Shirazi's depositions when it made Finding 6, not his motion. In making the finding, the trial court specifically referenced Shirazi's two depositions, which Newman offered as evidence and the trial court admitted as Exhibit 32. Tr. p. 446-47. While the last sentence of Finding 6 may reference Shirazi's motion—it is unclear exactly what filing the trial court is referring to—we find that any error does not warrant reversal because the basis for the trial court's finding was clearly Shirazi's depositions, which were offered as evidence by Newman.

Newman also argues that the trial court improperly referenced two lawsuits that she brought in unrelated matters: (1) a lawsuit that Newman filed against the JCC in 2005 referenced in Finding 18, and (2) a lawsuit that Newman filed against Marion County officials referenced in Finding 22. The trial court found:

18. [Newman] has picketed outside of the Jewish Community Center when her access was denied to an Art Fair where

[K.S.] was displaying some artwork. Thereafter, she sued the Jewish Community Center for events which are related to this case when her access to certain areas . . . was denied. Beverly Newman is not even a member of the Jewish Community Center, but she insisted on going there and being in places where she was not welcome. Beverly Newman has also sought a protective order against Jeff Sondhelm, the children's step-father, alleging abuse and threats against her, which Jeff Sondhelm has denied under oath.

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22. Julie testified that she is afraid to be around her mother for fear that her mother will raise new complaints against her husband or make allegations against anyone else who stands in her way. This pattern of behavior is not new for Beverly Newman. In the past, when she attempted to adopt children fromMaryland, (in a matter totally unrelated to this matter) she was unsuccessful and then spent a considerable amount of time and effort suing lawyers, judges, [and] the Department of Family & Children in both Indiana and Maryland. None of these were met with any success.

Appellant's App. p. 28-29.

It is true that a trial court generally may not take judicial notice of a different proceeding, even if it is before the same court in a related matter. Kennedy v. Jester, 700 N.E.2d 1170, 1173 (Ind. Ct. App. 1998). In Kennedy, we stated that the general rule against judicial notice of other proceedings "is designed to ensure that the facts alleged are indeed truly fact, not mere allegations." Id. The court went on:

Here, however, Appellants' counsel acknowledged to the trial court that Jester's criminal appeal was pending at the time of the final hearing. Accordingly, the evil the rule is designed to prevent has been fully protected against as Appellants themselves have admitted the fact judicially noticed. Therefore, we find no reversible error.

Id.

At the hearing, Newman testified that she had filed the lawsuits referenced in Findings 18 and 22 and acknowledged that she was unsuccessful in each. Tr. p. 217-22. Therefore, the "evil the rule is designed to prevent has been fully protected against . . ." because Newman admitted to filing the lawsuits. Kennedy, 700 N.E.2d at 1173. For that reason, as did the Kennedy court, we do not find the trial court's references to Newman's other lawsuits to be reversible error.

IV. Findings of Fact and Best Interests of M.S. and K.S.

The essence of Newman's argument is that the trial court made findings of fact that were unsupported by the evidence; therefore, its decision to deny Newman court-ordered visitation time with M.S. and K.S. was erroneous. See Appellant's Br. p. 13-35. Newman specifically attacks twenty of the thirty-four trial court findings.

A. Findings of Fact

Newman first directs us to Findings 8, 11, 19, 22, 23, 25, and 27 and argues that they are improper because they contain language such as "[s]he testified that . . ." or "[a]ccording to [the witness] . . . ." Appellant's App. p. 27, 28. Newman cites In re Adoption of T.J.F., which held that a trial court cannot simply recite testimony presented at a hearing and find it to be fact. 798 N.E.2d 867, 874 (Ind. Ct. App. 2003). "[T]he trier of fact must find that what the witness testified to is the fact." Id.

While the language that Newman directs us to is relevant, the T.J.F. court noted that the rationale for the specific findings requirement is for the parties to understand the evidentiary basis upon which the trial court's decision

rests so that the parties are "enabled to formulate intelligent and specific arguments on review." Id. As we have previously held in another grandparent-visitation case, "[t]he purpose of findings of fact and conclusions of law is to provide the parties and reviewing courts with the theory upon which the case was decided." McCune v. Frey, 783 N.E.2d 752, 757 (Ind. Ct. App. 2003).

Here, the trial court made detailed findings in its eight-page order regarding both the history between Sondhelmand Newman and Newman's interactions with M.S., K.S., and the Sondhelm family. The language that Newman complains of, mainly "[s]he testified that . . ." or "[a]ccording to . . . ," is followed by the trial court's summation of the testimony and the findings that the trial court reached based on the that evidence. Appellant's App. p. 27, 28. The trial court did not directly quote testimony and reach impulsive conclusions. Instead, it appears that the trial court carefully weighed the evidence presented at the hearing and summarized specific testimony, with language such as "[s]he testified that . . . ," to support its ultimate conclusion that court-ordered grandparent visitation was not in the grandchildren's best interests. On appeal, Newman does not argue that the trial court's findings were vague, that they did not shed light on its decision-making process, or that they hindered the formulation of her fifty-one-page appellate brief or her twenty-six-page reply brief. In essence, Newman asks us to dismiss seven findings because she disagrees with the wording that the trial court used to support its findings. We decline this invitation.

Newman also challenges Findings 8, 9, 15, 16, 17, 18, 19, 21, 24, 26, 27, 28, 29, 31, 32, and 33 and argues that these findings are not supported by the evidence presented at the hearing and, therefore, are clearly erroneous. See Appellant's Br. p. 20-31. When the trial court finds facts and states its conclusions pursuant to Indiana Trial Rule 52, we

will not set aside the findings or judgment unless clearly erroneous. Woodruff v. Klein, 762 N.E.2d 223, 226-27 (Ind. Ct. App. 2002). In applying a two-tiered standard of review, we "'determine whether the evidence supports the findings and the findings support the judgment.' In deference to the trial court's proximity to the issues, 'we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment.'" Id. at 227. We do not reweigh the evidence or determine the credibility of witnesses. Id. Instead, we consider the evidence most favorable to the judgment, with all reasonable inferences drawn in favor of the judgment. Id.

The majority of Newman's argument regarding these sixteen trial court findings primarily focuses on her belief that the trial court was biased against her when it made its decision. She repeatedly challenges the trial court's word choices and its characterization of her relationship with Sondhelm, M.S., and K.S. Newman stresses that these alleged mischaracterizations prove that the trial court was biased against her. See, e.g., Appellant's Br. p. 20-26, 27, 30 (regarding Findings 8, 15, 19, 24, 26, 29, 31). We will address any potential trial court bias later in this decision. See infra Part VII. The remainder of Newman's argument asks us to reweigh the evidence or determine the credibility of witnesses, a practice in which we do not engage upon appeal. Woodruff, 762 N.E.2d at 227. Therefore, we do not find the trial court's findings to be clearly erroneous.

B. Best Interests of M.S. and K.S.

Newman argues that the trial court erroneously focused on her and Sondhelm's relationship when it concluded that court-ordered grandparent visitation would not be in the best interests of M.S. and K.S. Specifically, Newman argues that the trial court should have focused more

on her relationship with M.S. and K.S. in making its determination.

As noted above, the trial court may order grandparent visitation if it determines that "visitation rights are in the best interest of the child." I.C. § 31-17-5-2. We are to "presume that a fit parent's decision is in the best interests of the child." Crafton, 752 N.E.2d at 96 (citing Troxel, 530 U.S. at 69). Acting under this presumption, we must give special weight to a parent's decision to deny or limit visitation. Troxel, 530 U.S. at 69-70. The determination of the best interests of the child is committed to the sound discretion of the trial court and will be reversed on appeal only upon a showing of an abuse of that discretion. Swartz, 720 N.E.2d at 1221.

Newman's argument 5 is very similar to the argument raised by the grandmother in Kennedy v. Kennedy, 688 N.E.2d 1264, 1269-70 (Ind. Ct. App. 1997). In Kennedy, the trial court denied the grandmother court-ordered visitation with her grandchild primarily because of the "dysfunctional relationship" it found between the grandmother and her son. Id. at 1269. On appeal, the grandmother argued that the trial court should have focused more on her relationship with her grandchild and less on her strained relationship with her son. Id. We held:

That focus [on the relationship between the grandparent and the grandchild], however, is the starting point, not the ending one, in the trial court's best interest analysis. The ultimate question is whether visitation in the face of family discord is in the child's best interest. That question can only be answered by looking at the totality of the circumstances presented. While the relationship may, in any given case, be sufficient to make grandparent visitation in the child's best interest, notwithstanding the dissension between the parent and grandparent, it may not be sufficient to overcome the effects of the discord on the child in another.

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From this evidence, the trial court could have properly concluded that the acrimony between Father and Grandmother was unhealthy for [the grandchild], regardless of the meaningful contact that he may have had with Grandmother in the past. Considering the totality of the circumstances, the court did not abuse its discretion when it denied Grandmother visitation rights. Id. at 1269-70 (emphases added).

Here, as in Kennedy, it was proper for the trial court to ultimately determine whether court-ordered visitation with Newman, in the face of family discord, was in M.S. and K.S.'s best interests. Therefore, it was proper for the trial court to elaborate on Newman and Sondhelm's "tumultuous at best" relationship 6 when determining what was in M.S. and K.S.'s best interests. Appellant's App. p. 27. In light of the bitterness, animosity, and acrimony between Newman and Sondhelm—regardless of any limited, meaningful contact Newman may have had with M.S. and K.S.—we cannot conclude that the trial court abused its discretion by focusing on Newman and Sondhelm's relationship and determining that court-ordered grandparent visitation would not be in the children's best interests.

V. Quashed Subpoenas and Admitted Exhibits

A. Quashed Subpoenas

Newman argues that the trial court erroneously quashed four witness subpoenas and that the testimony of those witnesses was relevant and material to the cause. Indiana Rule of Trial Procedure 45(B) provides that the trial court may "quash or modify the subpoena if it is unreasonable and oppressive." We will reverse a trial court's decision to quash a subpoena if the trial court abuses its discretion. Strodtman v. Integrity Builders, Inc., 668 N.E.2d 279, 286 (Ind. Ct. App. 1996). In determining whether

evidentiary error requires reversal, we assess the probable impact upon the trier of fact. Apter v. Ross, 781 N.E.2d 744, 759 (Ind. Ct. App. 2003).

We initially note that sixteen witnesses testified at the grandparent-visitation hearing, including Newman, Sondhelm, and Jeff. Newman first argues that the trial court erred by quashing Shirazi's subpoena because he was the biological father of M.S. and K.S., his testimony would have been relevant, and Shirazi's testimony may have supported Newman's desired relief. However, Newman had already deposed Shirazi twice, both depositions were admitted as evidence at the hearing, and Shirazi was living in California at the time of the hearing. Ex. 32. Therefore, we do not find that the trial court abused its discretion when it quashed Shirazi's subpoena.

Newman also argues that the trial court erred when it quashed the subpoenas of Brown and Tropp, two JCC employees who are defendants in Newman's tort lawsuit against the JCC. We first note that Newman does not cogently argue how either Brown or Tropp would have provided relevant testimony. And, as Brown and Tropp both argued in their motions,

Newman is represented by the same attorney in the civil tort action as represents her in this visitation case. This presents the peculiar (and admittedly rare) situation where Bev Brown [and Tropp] will be exposed to examination by an attorney who is prosecuting a tort case against [them]without the benefit of legal representation, as [they are] not [parties] in this matter.

Appellant's App. p. 198, 202. We find that the trial court did not abuse its discretion by granting Brown and Tropp's motions to quash in light of the rare situation and the

vagueness surrounding any potential relevancy of their testimony.

Finally, Newman argues that the trial court erred when it granted Classick's motion to quash. Classick was an employee of the St. Vincent Hospital where Sondhelm's fourth child was born in 2003. Newman argues that Classick "could have testified that Dr. Newman had not 'camped out' at the hospital . . ." as the trial court noted in Finding 27. Appellant's Br. p. 38 (emphasis in original). In her motion to quash, Classick stated that she "has no independent knowledge concerning [M.S.] and/or [K.S. or] . . . Sondhelm" and that she "has no specific, independent recollection of Beverly Newman . . . ." Appellant's App. p. 236. Newman's speculation as to how Classick could have testified does not warrant a finding that the trial court abused its discretion when it quashed Classick's subpoena, especially considering that Classick filed the motion to quash because she had no independent recollection of M.S., K.S., Sondhelm, or Newman. Therefore, we find that the trial court did not abuse its discretion by granting Classick's motion to quash.

B. Admitted Exhibits

Newman argues that Exhibits K and N were summaries of Sondhelm's testimony and should not have been admitted over Newman's objection at the hearing. We initially note that the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court, and we will reverse a trial court's decision only when the court has abused its discretion. Lachenman v. Stice, 838 N.E.2d 451, 464 (Ind. Ct. App. 2005), trans. denied.

Exhibit K is a timeline Sondhelm prepared regarding events relevant to Newman's action. Upon admission over Newman's objection, the trial court ruled "for purposes of

summary, it's admitted over objection subject to cross examination. . . . And for nothing more, I'll consider it as demonstrative evidence." Tr. p. 286. Demonstrative evidence is evidence offered for the purposes of illustration and clarification. Pilkington v. Hendricks County Rural Elec. Membership Corp., 460 N.E.2d 1000, 1010 (Ind. Ct. App. 1984). The theory justifying the admission of demonstrative evidence "requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact." Id. Upon admission of Exhibit K, the trial court explicitly stated that it would only be considered as demonstrative evidence. A timeline of events relevant to Newman's action was illustrative of relevant testimony, helpful to the trier of fact, and, therefore, admissible as demonstrative evidence. Id.

Newman also argues that the trial court erred by admitting Exhibit N, a two-page summary of Sondhelm's concerns regarding Newman's visitation with M.S. and K.S. We initially note that Sondhelm disclosed the summary with Newman during discovery. Tr. p. 362. The trial court admitted Exhibit N over Newman's objection "[t]o the extent that, in reviewing my notes and making a decision on this case, if I don't match these statements up with some evidentiary testimony, then I will tell you I will ignore it . . . [it is admitted as a] summary only, subject to cross." Id. at 364. While the trial court did not explicitly term Exhibit N "demonstrative evidence," we find that the trial court's rationale for admitting Exhibit N was similar to its rationale for admitting Exhibit K. Therefore, because Exhibit N was a summary of Sondhelm's testimony, helpful to the trier of fact, and the trial court stated that it would ignore parts that were unsupported by evidentiary testimony, we find that the trial court did not abuse its discretion by admitting Exhibit N.

VI. Ex Parte Communication

Newman argues that the trial court erred by engaging in ex parte communication with Sondhelm before it conducted in camera interviews with M.S. and K.S. Newman does not appeal the in camera interviews, appellant's reply br. p. 20; instead, she argues that there was ex parte communication between Sondhelm and the trial court before the interviews that prejudiced Newman.Newman claims that Sondhelm told the trial court, "It will only be [M.S.]. [K.S.] doesn't want to." Appellant's Br. p. 41. Although there is no evidence to suggest that the trial court did not interview both of the children, Newman claims that she was prejudiced because the trial court did not spend as much time interviewing K.S. because of Sondhelm's comment.

Newman does not cite to the record to support her claim regarding Sondhelm's alleged communication. Newman cites to Canon 3(B)(8) of the Code of Judicial Conduct:

a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications . . . except . . . ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized [if] the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Sondhelm does not admit to the alleged communication and, instead, argues that any communication on her part with the trial court was entirely "for administrative purposes to

facilitate interviewing the children." Appellee's Br. p. 24. Because Newman cannot support her claim that any communication between Sondhelm and the trial court was substantive and prejudicial, we must agree with Sondhelm and find that any communication was de minimus and administrative in nature. Therefore, the communication does not raise an inference of impropriety. See Sylvester v. State, 698 N.E.2d 1126, 1129 n.2 (Ind. 1998) (holding that any communication between the trial court and the attorney regarding trial scheduling "would merely be administrative and would thus fall under the exception to Indiana Judicial Conduct Canon 3(B)(8)").

VII. Trial Court Bias

As we mentioned in Part IV.A, Newman believes that the trial court was biased against her and that its bias ultimately affected the outcome of the case. While Newman does not challenge the trial court's partiality prior to orduring the hearing, appellant's br. p. 50, she extensively cites language from the trial court's order to support her contention that it was biased against her.

A party's success on a claim of bias and prejudice depends on its ability to make a plain showing that unfairness and prejudice existed and controlled the result. Chance v. Chance, 400 N.E.2d 1207, 1212 (Ind. Ct. App. 1980). After immersing ourselves in the record before us on appeal, we find that the trial court's findings do not suggest partiality and are, instead, based on evidence presented at the hearing. It seems that Newman argues that the trial court was biased simply because she does not agree with its findings or its ultimate conclusion. However, Newman's disagreement with the trial court's word choice and its characterization of her familial situation does not prove her bias claim. In fact, the trial court noted the respect that it had for Newman in its findings, even though it ultimately ruled against her:

31. Ms. Newman was the founder of the very prestigious GAGE Institute in Indianapolis. She has been on the forefront of education in the Indianapolis area for many years. This decision of this Court is in no way intended to minimize the significance and critical contributions that she has made to her daughter, Ms. Sondhelm, nor the contributions that she has made to her community and the many young people that she has touched in a very positive way. There is no doubt in the Court's mind that she is a caring, doting, loving, grandmother. However, there is equally no doubt in the Court's mind that ordering or requiring visitation between [Newman] and the grandchildren would not be in the children's best interest . . . . Id. at 31. Therefore, Newman's bias claimmust fail because she cannot show that unfairness and prejudice existed and controlled the result. Chance, 400 N.E.2d at 1212.

VIII. Attorney's Fees

On cross-appeal, Sondhelm argues that the trial court erred when it denied her request for attorney's fees. Specifically, Sondhelm contends that the trial court had the authority to award her attorney's fees under Indiana Code section 31-17-7-1 and that it erred by not doing so because it explicitly mentioned its desire to award her attorney's fees:

2. The Court finds that it has no authority to order [Newman] to pay a portion of Ms. Sondhelm's attorneys' fees. The Grandparent Visitation Statute contains no specific provision authorizing attorney's fees in an action filed pursuant to this chapter, Johnson v. Sprague, 614 N.E.2d 585, 590 (Ind. Ct. App. 1993). In addition, in Swartz v. Swartz, 720 N.E.2d 1219 (Ind. Ct. App. 1999), the Court held that the trial court abused its discretion in ordering a mother to pay grandparent's attorney fee without any statutory basis or agreement of the parties.

3. If the Court were able to order [Newman] to pay a portion of Ms. Sondhelm's attorney fees, it would do so. While certainly having the right to bring such action, [Newman] has litigated this matter fiercely, to say the least, and has sought numerous third party involvement, including subpoenas, Motion to Quash Subpoenas and has, from the Court's perspective[,] attempted to transform this case into either a modification of custody proceeding or a referendum on Ms. Sondhelm or a vindication of [Newman]. Ms. Sondhelm has incurred significant attorney fees that she would be entitled to reimbursement for, if there was statutory or case law for such. Appellant's App. p. 31-32.

Indiana follows the American Rule that ordinarily requires each party to pay their own attorney's fees. Salcedo v. Toepp, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998). Generally, attorney's fees are not recoverable from the opposing party as costs, damages, or otherwise, in the absence of an agreement between the parties, statutory authority, or rule to the contrary. City of Hammond v. Marina Entm't Complex, Inc., 681 N.E.2d 1139, 1142 (Ind. Ct. App. 1997). Indiana Code section 31-17-7-1, which is the is the "Costs and Attorney's Fees" section of the "Family Law: Custody and Visitation" article, provides:

The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under IC [§§] 31-17-2, IC 31-17-4, IC 31-17-6, or this chapter and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

I.C. § 31-17-7-1. The Grandparent Visitation Act, Indiana Code chapter 31-17-5, is not listed in section 31-17-7-1.

Newman argues that the trial court did not have the statutory authority to award Sondhelm attorney's fees under section 31-17-7-1. After analyzing the language of this section and in light of language from Schwartz, we must agree. See Schwartz, 720 N.E.2d at 1223 (holding that trial court abused its discretion when it awarded grandmother attorney's fees when trial court "did not identify a statutory basis for its award, nor do we find any statute applicable under these circumstances"). Therefore, the trial court correctly declined to award Sondhelm attorney's fees under section 31-17-7-1, and Sondhelm has not directed us to other applicable statutory authority.

Sondhelm next cites the common law "obdurate behavior exception," which provides that a trial court may award attorney's fees where a party has acted in bad faith. Johnson, 614 N.E.2d at 590. To qualify as obdurate behavior, the conduct must be vexatious and oppressive in the extreme, and the exception is limited to circumstances in which the respondent must defend against a baseless claim. Id. Sondhelm argues that the trial court should have awarded her attorney's fees under the obdurate behavior exception because it found that Newman "has litigated this matter fiercely, to say the least . . . Sondhelm has incurred significant attorney fees that she would be entitled to reimbursement for, if there was statutory or case law for such." Appellant's App. p. 31. However, the trial court explicitly noted in its order that Newman's claim was not baseless, and it did not unequivocally find that Newman acted in a vexatious nature. Therefore, we decline to reverse the trial court's decision to deny Sondhelm's request for attorney's fees.

IX. Appellate Attorney's Fees

Sondhelm requests appellate attorney's fees under Indiana Appellate Rule 66(E), which provides that our court may award a party attorney's fees if an appeal is frivolous or brought in bad faith. Specifically, Sondhelm argues that Newman made numerous frivolous arguments that were made in bad faith.

To prevail on a substantive bad faith claim and receive attorney's fees, the party must show that the appellant's contentions and arguments are devoid of all plausibility. Shepherd v. Truex, 819 N.E.2d 457, 464 (Ind. Ct. App. 2004). While Newman has vigorously argued numerous claims upon appeal, we find that her claims were colorable and were not made in bad faith or with a vexatious nature. Therefore, we decline Sondhelm's request for appellate attorney's fees.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.

1 We note that Lawrence was Newman's legal counsel at the trial court level and also represents her on appeal.

2 In her reply brief, Newman suggests that we should disregard Sondhelm's response brief "as if never filed" because it does not contain a summary of the argument, conclusion, signature block, or signature of counsel and, therefore, violates Indiana Appellate Rule 46. Appellant's Reply Br. p. 3. We initially note that Sondhelm's attorney did sign the response brief, appellee's br. p. 28, and that the appellate rules do not explicitly require a signature block. See Ind. Appellate Rule 46. Newman's request that we completelydisregard Sondhelm's response brief is severe, and Newman does not support the harsh remedy with case law

or specific appellate rule language. Because Sondhelm's twenty-nine-page response brief conforms to the appellate rules in all other respects, we decline to accept Newman's invitation to disregard it.

3 Ind. Code. § 31-17-5-1 to -10.

4 In her reply brief, Newman argues that Sondhelm did not address this argument in her response brief and instead only responded to Newman's argument regarding the trial court's classification of "Daniel" as a biblical name. Newman argues that Sondhelm has not responded to this argument and, therefore, Newman must only show prima facie error on the issue. Hacker v. Holland, 575 N.E.2d 675, 676 (Ind. Ct. App. 1991). However, after directly addressing Newman's previous argument in her brief, Sondhelm states "[l]ikewise, the remainder of Newman's argument in this regard is totally unfounded and deserves no further response."
Appellee's Br. p. 12 (emphasis added). While Sondhelm's curt response may not be to Newman's liking, Sondhelm extended her arguments regarding K.S.'s name to Newman's free exercise of religion argument—specifically, the argument that the trial court did not violate Newman's rights by citing her actions as evidence for its ultimate conclusion.

5 Newman admits that she "has never tried to establish that [Sondhelm] was an unfit parent." Appellant's Br.p. 26 n.5. Therefore, we are to presume that Sondhelm's decision to deny Newman visitation time is in the best interests of M.S. and K.S.

6 Newman argues that she presented evidence that her relationship with Sondhelm has been, at times, positive. While this may be true, evidence was also presented that the relationship has been extremely turbulent. As the reviewing court, we will not reweigh the evidence presented at the hearing. Swartz, 720 N.E.2d at 1221.

APPENDIX B

Cause Number 29D030501DR2
Lower Court Number: 29A05-0606-CV-00322

IN RE THE VISITATION OF: M.S.N.S. & K.D.N.S.

You are hereby notified that the SUPREME COURT has on this day 6/13/07

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF ADECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. MS

WITNESS my name and the seal of said Court,
this 13th day of JUNE, 2007

Clerk, Supreme Court, Court of Appeals and Tax Court

APPENDIX C

STATE OF INDIANA
SS:
COUNTY OF HAMILTON

IN THE HAMILTON SUPERIOR COURT 3
CAUSE NO. 29D03 0501 DR 2

IN RE: THE VISITATION OF
MINA SOFIA NAIMI SHIRAZI AND
KIAN DANIEL NAIMI SHIRAZI, Grandchildren
By Next Best Friend:
BEVERLY R. NEWMAN
Petitioner/Grandmother

SPECIAL JUDGE STEVE DAVID

FILED MAY 9, 2006

FINDINGS OF FACT. CONCLUSIONS OF LAW AND ORDER

This matter was submitted to the Court for final hearing on March 3, 2006 and April 3, 2006. Following the presentation of evidence, the Court took this matter under advisement pending the submission of proposed findings of fact and conclusions of law by the parties. The Court also interviewed subject children in chambers.

The Court being duly advised now FINDS, CONCLUDES AND ORDERS as follows:

1. This case has been brought by the Petitioner (hereinafter "Ms. Newman" or "Grandmother" or "Petitioner" or "Beverly Newman") pursuant to Indiana Code 31-17-5-1 which provides that (a) a child's grandparent may seek

visitation rights if; (1) the child's parent is deceased; (2) the marriage of the child's parents has been dissolved in Indiana; or (3) subject to subsection (b) the child was born out of wedlock. The children's' parents in this case did have their marriage dissolved in the State of Indiana, thus Indiana Code 31-17-5-1 will apply.

2. Indiana Code 31-17-5-2 requires that: (a) the Court may grant visitation rights if the Court determines that visitation rights are in the best interest of the child; (b) in determining the best interest of the child under this section, the Court may consider whether a grandparent has had or has attempted to have meaningful contact with the child.

3. The Indiana Court of Appeals in Crafton v. Gibson, 752 N.E.2d 78 (Ind.App. 2001) examined the grandparent visitation statute in light of the Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 2000 and held that the two factors outlined in Indiana Code 31-17-5-2 should be supplemented by the fact that a presumption must be made that a fit parent acts in his or her child's best interests. Thus a trial court must give special weight to a fit parent's decision regarding non-parental visitation.

4. A year later, the Indiana Court of Appeals in Woodruffv. Klein, 762 N.E.2d 223 (Ind.App. 2002) held that there is a three part analysis to be used to determine the best interests of grandchildren: (1) a fit parent is presumed to act in the best interests of the child, thus special weight must be given to a fit parent's decision regarding non-parental visitation; (2) special weight also must be given to a parent's offer of any visitation to the petitioning grandparent; and (3) the court must look to see if there is any meaningful relationship in the past between the grandparent and the child and give special weight to the fact that such relationship did exist.

5. The custodial parent, Julie Sondhelm, (hereinafter "Mother" or "Ms. Sondhelm" or "Julie" is directly opposed to any relief requested in her mother's (Ms.Newman's) request for grandparent visitation.

6. Shahram Shirazi, the biological father of the two children, did not appear to testify. However, he was deposed on two separate occasions and his depositions were introduced into evidence. Although Mr. Shirazi appears at times to be ambivalent about visitation, he agreed only if it were supervised visitation. His counsel has stated in a filing with this Court that he opposes any visitation sought by Beverly R. Newman.

7. The step-father of the children, Jeffrey Sondhelm, also opposes any of the relief requested per the petition for grandparent visitation filed by Beverly R. Newman. He testified. He was an excellent witness. He is a caring step-father.

8. Julie Sondhelm has shown through testimony that she is indeed a fit mother. Jeff Sondhelm is shown to be a fit step-father. Ms. Sondhelm is the mother of four children. She was also an excellent witness. She is a loving mother. There is nothing about her testimony that caused the Court any concern. She simply does not want her grandchildren to be forced to exercise visitation with her mother. She laundry listed numerous reasons why the Court should not order visitation. The Court has recited a number of those concerns in this Order. She became very emotional at the thought of requiring visitation. She was very concerned about her children's well being. She was very concerned about what the Petitioner would tell her children about her and about the family. She was very concerned that the Petitioner would not follow any of her instructions, nor any order of the Court. She testified that she and her family have been "stalked" by the Petitioner.

9. It was shown through testimony that Beverly R. Newman continues to this day to have contact with her grandchildren that are the subject of this petition in events involving their school, their synagogue, and other public events wherein the families see each other. However, even this limited contact is problematic as Beverly Newman refuses to accept limits requested by the mother.

10. This case is a soap opera. Unfortunately, it involves real, although well intentioned people, particularly a grandmother (Petitioner) and step grandfather (Counsel for Petitioner) and a daughter (Ms. Sondhelm), who do not have a relationship with each other at present, and whose relationship over the past ten years has been tumultuous at best, and whose legal battleground has centered upon Ms.Newman's grandchildren. The Petitioner is trying to force her daughter, Julie Sondhelm, to allow regular visitation between her and her grandchildren. This is not an indictment of grandparents. The author of this opinion, himself, is a step-grandparent. Grandparent involvement is critical and is usually always a good thing, if not a great thing. Unfortunately, at present, the facts of this case are clear that no useful purpose of any kind would be served by ordering Grandparent visitation, given the current relationship between the Petitioner and Ms. Sondhelm.

11. Julie testified at some length about her childhood. The testimony was not of significant relevance, except to underscore the tension that exists between Mother and Grandmother. According to Ms. Sondhelm, she was forced to do numerous duties for her mother, as a child, such as to comb her hair, clean up and do chores at the school that was founded by Beverly Newman, to console her mother when her adoptive father left the home and filed for divorce, and to suffer both verbal and physical abuse. While Petitioner disputes Ms. Sondhelm's version of her childhood, their

conflicting testimony underscores the conflict between them that has existed for years and has only occasionally been cordial.

12. Ms. Sondhelm left Petitioner's home shortly after she became 18 years of age. She left with very few clothes and no money. Her mother did not help her thereafter with her expenses at IUPUI. Ms. Sondhlem sought help from her grandfather and from friends within the Jewish community. Julie, a member of the Jewish faith, then married Shahram Shirazi, an Iranian Persian Muslim. There was no contact between Julie and her mother for several years.

13. Petitioner did not attend the wedding between Julie and Shahram; she did not attend the birth of either of the two children that are the subject of this litigation; she had very little contact with them until after Shahram Shirazi and Julie Sondhelm were divorced.

14. The Court finds that generally, whenever Beverly Newman's requests with regard to her grandchildren were contradicted by her daughter, there was a dispute.

15. Julie has made several attempts to reconcile with her mother. They always ended in fights and disputes. Although Julie did allow her mother to provide some care for her children between 1999 and 2001, this effort also failed.

16. Ms. Newman has gone to great extremes in what appears to be an obsession to have time with her grandchildren whenever she wishes.

17. To the Court, she has presented herself as an obsessed - take no prisoners – no compromise - "I know what is best for my grandchildren" litigant. She appeared at times, somewhat child like, manipulative, and consumed with this case.

18. She has picketed outside of the Jewish Community Center when her access was denied to an Art Fair where Kian Shirazi was displaying some artwork. Thereafter, she sued the Jewish Community Center for events which are related to this case when her access to certain areas within the Jewish Community Center was denied. Beverly Newman is not even a member of the Jewish Community Center, but she insisted on going there and being in places where she was not welcome. Beverly Newman has also sought a protective order against Jeff Sondhelm, the children's stepfather, alleging abuse and threats against her, which Jeff Sondhelm has denied under oath.

19. Beverly Newman also prepared a very lengthy document entitled "Elder Abuse" which outlines allegations against both Julie and Jeff. She testified, under oath, that she does not remember to whom she sent the document. She wants visitation with the children of the woman that she is publicly accusing of elder abuse!! She does acknowledge that she sent a complaint to one of Julie's supervisors at the Jewish Community Center where Julie was employed. In addition, according to Ms. Sondhelm's husband, Jeff, Petitioner has told him that she has an "FBI" file on him.

20. Julie Sondhelm and Petitioner are both members of the Jewish community in Indianapolis, Indiana. Julie has previously worked for the Jewish Community Center in a social work capacity.

21. On March 17, 2006, after the first hearing in this matter and before the hearing on April 3, Beverly Newman sent a letter to several Rabbis within the Jewish community alleging that crimes were committed by a Jewish male against Mina and Kian Shirazi in Julie's home. She further alleged that this Jewish male is now in custody. These are extremely damaging allegations to be publishing against her

daughter. It appears that a young boy did attempt to pull down the pants of Mina Shirazi while there were several children and families at Julie and Jeff's home. However, the cause for this young boy's later incarceration was not because of the contact with Mina Shirazi but was because of the contact with another child. Beverly Newman's conduct in this regard is certainly not persuasive to the Court as to why she should have visitation with her grandchildren over the mother's objections. It appears as if Ms. Newman is also alleging that Mother is unfit to parent the children. Such allegation or inference is nonsense. The letter from Beverly Newman dated March 17,2006 was admitted into evidence as Respondent's Exhibit P.

22. Julie testified that she is afraid to be around her mother for fear that her mother will raise new complaints against her husband or make allegations against anyone else who stands in her way. This pattern of behavior is not new for Beverly Newman. In the past, when she attempted to adopt children from Maryland, (in a matter totally unrelated to this matter) she was unsuccessful and then spent a considerable amount of time and effort suing lawyers, judges, the Department of Family & Children in both Indiana and Maryland. None of these were met with any success.

23. Betty Solooki testified that she and other women at the synagogue try to help protect the children from Beverly Newman's influences. They have heard her making inappropriate comments to the children, promising gifts to the friends of Mina and Kian if they would bring them to her house, etc.

24. A glaring example of Beverly Newman's refusal to acknowledge her daughter's authority over the children in question is the fact that Beverly Newman will not call the male child "Kian", although that is his first name. Beverly Newman insists on calling him "Daniel," his "biblical"

middle name. She has insisted on doing this despite repeated requests to call him Kian. She and her counsel even improperly referred to the child during the trial in this matter. Such is inexcusable, and is further evidence of her attempts to dominate and control.

25. Beverly's father and Julie's grandfather, Al Katz, traveled from Florida to testify at the hearing in this matter. In summary, he testified that his daughter, Beverly, wants to be the mother for these grandchildren, not the grandmother. He believes that she is sick and should seek treatment. Al Katz also testified that Beverly Newman has no relationship with her only brother by virtue of her behavior.

26. In summary, Petitioner has no real relationship with her real father, her brother and her daughter, Ms. Sondhelm. Forcing a relationship with her grandchildren would be a most regretful and ill advised decision.

27. Beverly Newman actually testified that she believes that she is the "one and only person in the world" that has the best interests and is best suited to care for Mina and Kian Shirazi. In essence, she contends that she is better suited to take care of these two children than their own mother. Because of her views, it is easy to see why her insistence on seeing the children would be a major disruptive factor in the Sondhelm family.

28. The Sondhelm family now has four children, not two. Julie has the best interests of all of her children in mind when she has elected not to permit visitation with her mother.

29. Ms. Newman has followed Julie and the children to their car on many occasions. She has shadowed or dogged them at their place of worship, on the soccer field, and has "camped" out at the hospital hoping to see the children.

30. Ms. Newman has accomplished many wonderful things in her life. Despite Ms. Sondhelm's version of her childhood, she was a very good student, and was taught personally by her mother for many years. She ultimately received numerous scholarships.

31. Ms. Newman was the founder of the very prestigious GAGE Institute in Indianapolis. She has been on the forefront of education in the Indianapolis area for many years. This decision of this Court is in no way intended to minimize the significant and critical contributions that she has made to her daughter, Ms. Sondhelm, nor the contributions that she has made to her community and the many young people that she has touched in a very positive way. There is no doubt in the Court's mind that she is a caring, doting, loving grandmother. However, there is equally no doubt in the Court's mind that ordering or requiring visitation between Petitioner and the grandchildren would not be in the children's best interest and, given the relationship between Petitioner and her daughter, Ms. Sondhelm, and given the Petitioner's testimony as to what she believes best for the grandchildren, and the Court being convinced that she could not follow any rules established by the Court that she did not agree with, such order would be injurious to the mental and emotional well being of the children.

32. Another of the many concerns the Court has is that, if granted visitation by Court order, Petitioner will attempt to manipulate the grandchildren or alienate the grandchildren from their mother.

33. This is a mother-daughter relationship gone awry, and the Court will not facilitate another round between the two. Ms. Sondhelm should be allowed to parent her children in peace, without influence from the Petitioner. Maybe, over time, Mother and Daughter can repair their relationship, and Grandmother be reunited with the children.

34. Under all of the circumstances in this case, it is the Court's conclusion that it does not serve the best interests of the children for there to be court-ordered grandparent visitation.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED as follows:

1. The petition for Grandparent visitation is hereby denied.

2. The Court finds that it has no authority to order Petitioner to pay a portion of Ms. Sondhelm's attorneys' fees. The Grandparent Visitation Statute contains no specific provision authorizing attorney's fees in an action filed pursuant to this chapter, Johnson v. Sprague, 614 N.E. 2d 585, 590 (Ind.Ct.App. 1993). In addition, in Swartz v. Swartz, 720 N.E.2d 1219 (Ind.Ct.App 1999), the Court held that the trial court abused its discretion in ordering a mother to pay grandparent's attorney fee without any statutory basis or agreement of the parties.

3. If the Court were able to order Petitioner to pay a portion of Ms. Sondhelm's attorney fees, it would do so. While certainly having the right to bring such action, Petitioner has litigated this matter fiercely, to say the least, and has sought numerous third party involvement, including subpoenas, Motion to Quash Subpoenas and has, from the Court's perspective attempted to transform this case into either a modification of custody proceeding or a referendum on Ms. Sondhelm or a vindication of the Petitioner. Ms. Sondhelm has incurred significant attorney fees that she would be entitled to reimbursement for, if there was statutory or case law for such.

Dated: 5-8-06 SPECIAL JUDGE STEVE DAVID